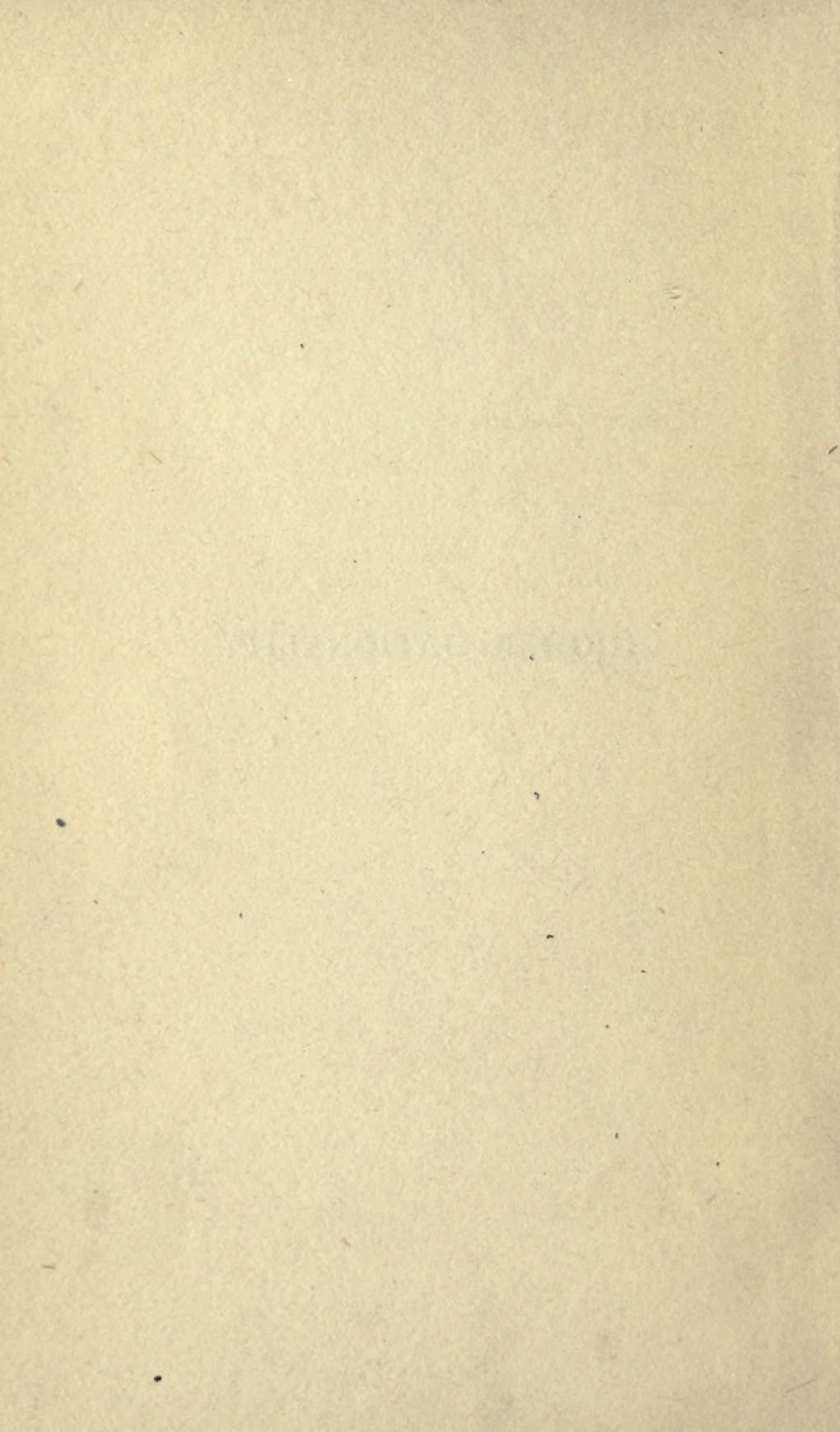




HIGHER NATIONALITY



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A STUDY IN LAW AND ETHICS

AN ADDRESS DELIVERED BEFORE THE
AMERICAN BAR ASSOCIATION AT MONTREAL
ON 1ST SEPTEMBER 1913

Richard Burdon

BY VISCOUNT HALDANE OF CLOAN

LORD CHANCELLOR OF GREAT BRITAIN

130604
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LONDON

JOHN MURRAY, ALBEMARLE STREET, W.

1913



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IT is with genuine pleasure that I find myself among my fellow-lawyers of the New World. But my satisfaction is tempered by a sense of embarrassment. There is a multitude of topics on which it would be most natural that I should seek to touch. If, however, I am to use to any purpose the opportunity which you have accorded me, I must exclude all but one or two of them. For in an hour like this, as in most other times of endeavour, he who would accomplish anything must limit himself. What I have to say will therefore be confined to the suggestion of little more than a single thought, and to its development and illustration with materials that lie to hand. I wish to lay before you a result at which I have arrived after reflection, and to submit it for your consideration with such capacity as I possess.

For the occasion is as rare as it is important. Around me I see assembled some of the most distinguished figures in the public life of this Continent; men who throughout their careers

have combined law with statesmanship, and who have exercised a potent influence in the fashioning of opinion and of policy. The law is indeed a calling notable for the individualities it has produced. Their production has counted for much in the past of the three nations that are represented at this meeting, and it means much for them to-day.

What one who finds himself face to face with this assemblage naturally thinks of is the future of these three nations, a future that may depend largely on the influence of men with opportunities such as are ours. The United States and Canada and Great Britain together form a group which is unique, unique because of its common inheritance in traditions, in surroundings, and in ideals. And nowhere is the character of this common inheritance more apparent than in the region of jurisprudence. The lawyers of the three countries think for the most part alike. At no period has political divergence prevented this fact from being strikingly apparent. Where the letter of their law is different the spirit is yet the same, and it has been so always. As I speak of the historical tradition of our great calling, and of what appears likely to be its record in days to come, it seems to me that we who are here gathered may well proclaim, in the words of the Spartans, "We are what you were, we shall be what you are."

It is this identity of spirit, largely due to a past which the lawyers of the group have inherited jointly, that not only forms a bond of union, but furnishes them with an influence that can hardly be reproduced in other nations. I will therefore venture to look ahead. I will ask you to consider with me whether we, who have in days gone by moulded their laws, are not called on to try in days that lie in front to mould opinion in yet another form, and so encourage the nations of this group to develop and recognise a reliable character in the obligations they assume towards each other. For it may be that there are relations possible within such a group of nations as is ours that are not possible for nations more isolated from each other and lacking in our identity of history and spirit. Canada and Great Britain on the one hand and the United States on the other, with their common language, their common interests, and their common ends, form something resembling a single society. If there be such a society, it may develop within itself a foundation for international faith of a kind that is new in the history of the world. Without interfering with the freedom of action of these great countries or the independence of their constitutions, it may be possible to establish a true unison between Sovereign States. This unison will doubtless, if it ever comes into complete being, have its witnesses in treaties and

written agreements. But such documents can never of themselves constitute it. Its substance, if it is to be realised, must be sought for deeper down in an intimate social life. I have never been without hope that the future development of the world may bring all the nations that compose it nearer together, so that they will progressively cease to desire to hold each other at arm's length. But such an approximation can only come about very gradually, if I read the signs of the times aright. It seems to me to be far less likely of definite realisation than in the case of a group united by ties such as those of which I have spoken.

Well, the growth of such a future is at least conceivable. The substance of some of the things I am going to say about its conception, and about the way by which that conception may become real, is as old as Plato. Yet the principles and facts to which I shall have to refer appear to me to be often overlooked by those to whom they might well appear obvious. Perhaps the reason is the deadening effect of that conventional atmosphere out of which few men in public life succeed in completely escaping. We can best assist in the freshening of that atmosphere by omitting no opportunity of trying to think rightly, and thereby to contribute to the fashioning of a more hopeful and resolute kind of public opinion. For, as some-

one has said, “L’opinion générale dirige l’autorité, quels qu’on soient les dépositoires.”

The chance of laying before such an audience as this what was in my mind made the invitation which came from the Bar Association and from the heads of our great profession, both in Canada and in the United States, a highly attractive one. But before I could accept it I had to obtain the permission of my Sovereign; for, as you know, the Lord Chancellor is also *Custos Sigilli*, the Keeper of that Great Seal under which alone supreme executive acts of the British Crown can be done. It is an instrument he must neither quit without special authority, nor carry out of the realm. The head of a predecessor of mine, Cardinal Wolsey, was in peril because he was so daring as to take the Great Seal across the water to Calais, when he ought instead to have asked his Sovereign to put it into Commission.

Well, the *Clavis Regni* was on the present occasion put safely into Commission before I left, and I am privileged to be here with a comfortable constitutional conscience. But the King has done more than graciously approve of my leaving British shores. I am the bearer to you of a message from him which I will now read:

“I have given my Lord Chancellor permission to cross the seas, so that he may address the

meeting at Montreal. I have asked him to convey from me to that great meeting of the lawyers of the United States and of Canada my best wishes for its success. I entertain the hope that the deliberations of the distinguished men of both countries who are to assemble at Montreal may add yet further to the esteem and goodwill which the people of the United States and of Canada and the United Kingdom have for each other."

The King's message forms a text for what I have to say, and, having conveyed that message to you, I propose in the first place to turn to the reasons which make me think that the class to which you and I belong has a peculiar and extensive responsibility as regards the future relations of the three countries. But these reasons turn on the position which Courts of Law hold in Anglo-Saxon constitutions, and in entering on them I must recall to you the character of the tradition that tends to fashion a common mind in you and me as members of a profession that has exercised a profound influence on Anglo-Saxon society. It is not difficult in an assemblage of lawyers such as we are to realise the process by which our customary habits of thought have come into being and bind us together. The spirit of the jurisprudence which is ours, of the system which we apply to the regulation of human affairs in Canada, in the United States, and in Great Britain alike, is

different from that which obtains in other countries. It is its very peculiarity that lends to it its potency, and it is worth while to make explicit what the spirit of our law really means for us.

I read the other day the reflections of a foreign thinker on what seemed to him the barbarism of the entire system of English jurisprudence, in its essence judge-made and not based on the scientific foundation of a code. I do not wonder at such reflections. There is a gulf fixed between the method of a code and such procedure as that of Chief-Justice Holt in *Coggs v. Bernard*, of Chief-Justice Pratt in *Armory v. Delamirie*, and of Lord Mansfield when he defined the count for money had and received. A stranger to the spirit of the law as it was evolved through centuries in England will always find its history a curious one. Looking first at the early English Common Law, its most striking feature is the enormous extent to which its founders concerned themselves with remedies before settling the substantive rules for breach of which the remedies were required. Nowhere else, unless perhaps in the law of ancient Rome, do we see such a spectacle of legal writs making legal rights. Of the system of the Common Law there is a saying of Mr Justice Wendell Holmes which is profoundly true: "The life of the law has not been logic; it has been experience. The felt necessities of

the time, the prevalent moral and political theories, intentions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." As the distinguished writer whom I have quoted tells us, we cannot, without the closest application of the historical method, comprehend the genesis and evolution of the English Common Law. Its paradox is that in its beginnings the forms of action came before the substance. It is in the history of English remedies that we have to study the growth of rights. I recall a notable sentence in one of Sir Henry Maine's books. "So great," he declares, "is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has, at first, the look of being gradually secreted in the interstices of procedure." I will add to his observation this: that all our reforms notwithstanding, the dead hands of the old forms of action still rest firmly upon us. In logic the substantive conceptions ought of course to have preceded these forms. But the historical sequence has been different, for reasons with which every com-

petent student of early English history is familiar. The phenomenon is no uncommon one. The time spirit and the spirit of logical form do not always, in a world where the contingent is ever obtruding itself, travel hand in hand. The germs of substantive law were indeed present as potential forces from the beginning, but they did not grow into life until later on. And therefore forms of action have thrust themselves forward with undue prominence. That is why the understanding of our law is, even for the practitioner of to-day, inseparable from knowledge of its history.

As with the Common Law, so it is with Equity. To know the principles of Equity is to know the history of the Courts in which it has been administered, and especially the history of the office which at present I chance myself to hold. Between law and equity there is no other true line of demarcation. The King was the fountain of justice. But to get justice at his hands it was necessary first of all to obtain the King's writ. As Bracton declared, "non potest quis sine brevi agere." But the King could not personally look after the department where such writs were to be obtained. At the head of this, his Chancery, he therefore placed a Chancellor, usually a bishop, but sometimes an archbishop and even a cardinal, for in these days the Church had a grip which

to a Lord Chancellor of the twentieth century is unfamiliar. At first the holder of the office was not a judge. But he was keeper of the King's conscience, and his business was to see that the King's subjects had remedies when he considered that they had suffered wrongs. Consequently he began to invent new writs, and finally to develop remedies which were not confined by the rigid precedents of the Common Law. Thus he soon became a judge.

When he found that he could not grant a Common Law writ he took to summoning people before him and to searching their consciences. He inquired, for instance, as to trusts which they were said to have undertaken, and as the result of his inquiries rights and obligations unknown to the Common Law were born in his Court of Conscience. You see at a glance how susceptible such a practice was of development into a complete system of Equity. You would expect, moreover, to find that the ecclesiastical atmosphere in which my official predecessors lived would influence the forms in which they moulded their special system of jurisprudence. This did indeed happen; but even in those days the atmosphere was not merely ecclesiastical. For the Lord High Chancellor in the household of an early English monarch was the King's domestic chaplain, and as, unlike his fellow-servants in the household,

the Lord High Steward and the Lord Great Chamberlain, he always possessed the by no means common advantage of being able to read and write, he acted as the King's political secretary. He used, it seems, in early days to live in the palace, and he had a regular daily allowance. From one of the records it appears that his wages were five shillings, a simnel cake, two seasoned simnels, one sextary of clear wine, one sextary of household wine, one large wax candle, and forty small pieces of candle. In the time of Henry II. the modern treasury spirit appears to have begun to walk abroad, for in the records the allowance of five shillings appears as if subjected to a reduction. If he dined away from the palace, *si extra domum comederit*, and was thereby forced to provide extras, then indeed he got his five shillings. But if he dined at home, *intra domum*, he was not allowed more than three shillings and sixpence. The advantage of his position was, however, that, living in the palace, he was always at the King's ear. He kept the Great Seal through which all great acts of state were manifested. Indeed it was the custody of the Great Seal that made him Chancellor. Even to-day this is the constitutional usage. When I myself was made Lord Chancellor the appointment was effected, not by Letters Patent, nor by writing under the Sign Manual, nor even by words spoken, but by the

Sovereign making a simple delivery of the Great Seal into my hands while I knelt before him at Buckingham Palace in the presence of the Privy Council.

The reign of Charles I. saw the last of the ecclesiastical chancellors. The slight sketch of the earlier period which I have drawn shows that in these times there might well have developed a great divergence of Equity from the Common Law, under the influence of the Canon and Roman laws to which ecclesiastical chancellors would naturally turn. In the old Courts of Equity it was natural that a different atmosphere from that of the Common Law Courts should be breathed. But with the gradual drawing together of the Courts of Law and Equity under lay chancellors the difference of atmosphere disappears, and we see the two systems becoming fused into one.

The moral of the whole story is the hopelessness of attempting to study Anglo-Saxon jurisprudence apart from the history of its growth and of the characters of the judges who created it. It is by no accident that among Anglo-Saxon lawyers the law does not assume the form of codes, but is largely judge-made. We have statutory codes for portions of the field which we have to cover. But those statutory codes come, not at the beginning, but at the end. For the most part the law has already

been made by those who practise it before the codes embody it. Such codes with us arrive only with the close of the day, after its heat and burden have been borne, and when the journey is already near its end.

I have spoken of a spirit and of traditions which have been apparent in English law. But they have made their influence felt elsewhere. My judicial colleagues in the province of Quebec administer a system which is partly embodied in a great modern code, and partly depends on old French law of the period of Louis XIV. They apply, moreover, a good deal of the public and commercial law of England. The relation of the code to these systems has given rise to some controversies. What I have gathered, however, when sitting in the Judicial Committee of the Privy Council, is that a spirit not very different from that of the English lawyers has prevailed in Quebec. The influence of the judges in moulding the law, and of legal opinion in fashioning the shape which it should take, seem to me to have been hardly less apparent in Quebec than elsewhere in Canada. Indeed the several systems of our group of nations, however those systems have originated, everywhere show a similar spirit, and disclose the power of our lawyers in creating and developing the law as well as in changing it, a power which has been more exercised

outside the legislature than within it. It is surely because the lawyers of the New World have an influence so potent and so easily wielded that they have been able to use it copiously in a wider field of public affairs than that of mere jurisprudence. It is very striking to the observer to see how many of the names of those who have controlled the currents of public opinion in the United States and Canada alike have been the names of famous lawyers. I think this has been so partly because the tradition and spirit of the law were always what I have described, and different from that on the Continent of Europe. But it has also been so because, in consequence of that tradition and spirit, the vocation of the lawyer has not, as on the Continent of Europe, been that of a segregated profession of interpreters, but a vocation which has placed him at the very heart of affairs. In the United Kingdom this has happened in the same fashion, yet hardly to so great an extent, because there has been competition of other and powerful classes whose tradition has been to devote their lives to a Parliamentary career. But in the case of all three nations it is profoundly true that, as was said by the present President of the United States in 1910, in an address delivered to this very Association, "the country must find lawyers of the right sort and the old spirit to advise it, or it must

stumble through a very chaos of blind experiment." "It never," he went on to add, "needed lawyers who are also statesmen more than it needs them now—needs them in its courts, in its legislatures, in its seats of executive authority—lawyers who can think in the terms of society itself."

This at least is evident, that if you and I belong to a great calling, it is a calling in which we have a great responsibility. We can do much to influence opinion, and the history of our law and the character of our tradition render it easy for us to attain to that unity in habit of thought and sentiment which is the first condition of combined action. That is why I do not hesitate to speak to you as I am doing.

And having said so much, I now submit to you my second point. The law has grown by development through the influence of the opinion of society guided by its skilled advisers. But the law forms only a small part of the system of rules by which the conduct of the citizens of a state is regulated. Law, properly so called, whether civil or criminal, means essentially those rules of conduct which are expressly and publicly laid down by the sovereign will of the state, and are enforced by the sanction of compulsion. Law, however, imports something more than this. As I have already remarked, its full significance cannot be understood apart

from the history and spirit of the nation whose law it is. Moreover it has a real relation to the obligations even of conscience, as well as to something else which I shall presently refer to as the General Will of Society. In short, if its full significance is to be appreciated, larger conceptions than those of the mere lawyer are essential, conceptions which come to us from the moralist and the sociologist, and without which we cannot see fully how the genesis of law has come about. That is where writers like Bentham and Austin are deficient. One cannot read a great book like the *Esprit des Lois* without seeing that Montesquieu had a deeper insight than Bentham or Austin, and that he had already grasped a truth which, in Great Britain at all events, was to be forgotten for a time.

Besides the rules and sanctions which belong to law and legality, there are other rules, with a different kind of sanction, which also influence conduct. I have spoken of conscience, and conscience, in the strict sense of the word, has its own court. But the tribunal of conscience is a private one, and its jurisdiction is limited to the individual whose conscience it is. The moral rules enjoined by the private conscience may be the very highest of all. But they are enforced only by an inward and private tribunal. Their sanction is subjective and not binding in the same way on all men. The very loftiness of the

motive which makes a man love his neighbour more than himself, or sell all his goods in order that he may obey a great and inward call, renders that motive in the highest cases incapable of being made a rule of universal application in any positive form. And so it was that the foundation on which one of the greatest of modern moralists, Immanuel Kant, sought to base his ethical system, had to be revised by his successors. For it was found to reduce itself to little more than a negative and therefore barren obligation to act at all times from maxims fit for law universal, maxims which, because merely negative, turned out to be inadequate as guides through the field of daily conduct. In point of fact that field is covered, in the case of the citizen, only to a small extent by law and legality on the one hand, and by the dictates of the individual conscience on the other. There is a more extensive system of guidance which regulates conduct and which differs from both in its character and sanction. It applies, like law, to all the members of a society alike, without distinction of persons. It resembles the morality of conscience in that it is enforced by no legal compulsion. In the English language we have no name for it, and this is unfortunate, for the lack of a distinctive name has occasioned confusion both of thought and of expression. German writers have, however,

marked out the system to which I refer and have given it the name of "Sittlichkeit." In his book, *Der Zweck im Recht*, Rudolph von Jhering, a famous professor at Göttingen, with whose figure I was familiar when I was a student there nearly forty years ago, pointed out, in the part which he devoted to the subject of "Sittlichkeit," that it was the merit of the German language to have been the only one to find a really distinctive and scientific expression for it. "Sittlichkeit" is the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which it is "bad form" or "not the thing" to disregard. Indeed regard for these obligations is frequently enjoined merely by the social penalty of being "cut" or looked on askance. And yet the system is so generally accepted and is held in so high regard, that no one can venture to disregard it without in some way suffering at the hands of his neighbours for so doing. If a man maltreats his wife and children, or habitually jostles his fellow-citizen in the street, or does things flagrantly selfish or in bad taste, he is pretty sure to find himself in a minority and the worse off in the end. Not only does it not pay to do these things, but the decent man does not wish to do them. A feeling analogous to what arises from the dictates of his more private and individual

conscience restrains him. He finds himself so restrained in the ordinary affairs of daily life. But he is guided in his conduct by no mere inward feeling, as in the case of conscience. Conscience and, for that matter, law overlap parts of the sphere of social obligation about which I am speaking. A rule of conduct may, indeed, appear in more than one sphere, and may consequently have a twofold sanction. But the guide to which the citizen mostly looks is just the standard recognised by the community, a community made up mainly of those fellow-citizens whose good opinion he respects and desires to have. He has everywhere round him an object-lesson in the conduct of decent people towards each other and towards the community to which they belong. Without such conduct and the restraints which it imposes there could be no tolerable social life, and real freedom from interference would not be enjoyed. It is the instinctive sense of what to do and what not to do in daily life and behaviour that is the source of liberty and ease. And it is this instinctive sense of obligation that is the chief foundation of society. Its reality takes objective shape and displays itself in family life and in our other civic and social institutions. It is not limited to any one form, and it is capable of manifesting itself in new forms and of developing and changing old

forms. Indeed the civic community is more than a political fabric. It includes all the social institutions in and by which the individual life is influenced—such as are the family, the school, the church, the legislature, and the executive. None of these can subsist in isolation from the rest; together they and other institutions of the kind form a single organic whole, the whole which is known as the Nation. The spirit and habit of life which this organic entirety inspires and compels are what, for my present purpose, I mean by "Sittlichkeit." "Sitte" is the German for custom, and "Sittlichkeit" implies custom and a habit of mind and action. It also implies a little more. Fichte¹ defines it in words which are worth quoting, and which I will put into English: "What, to begin with," he says, "does 'Sitte' signify, and in what sense do we use the word? It means for us, and means in every accurate reference we make to it, those principles of conduct which regulate people in their relations to each other, and which have become matter of habit and second nature at the stage of culture reached, and of which, therefore, we are not explicitly conscious. Principles, we call them, because we do not refer to the sort of conduct that is casual or is determined on casual grounds, but to the hidden and uniform ground

¹ *Grundzüge des Gegenwärtigen Zeitalters*, Werke, Band vii., p. 214.

of action which we assume to be present in the man whose action is not deflected and from which we can pretty certainly predict what he will do. Principles, we say, which have become a second nature and of which we are not explicitly conscious. We thus exclude all impulses and motives based on free individual choice, the inward aspect of 'Sittlichkeit,' that is to say morality, and also the outward side, or law, alike. For what a man has first to reflect over and then freely to resolve is not for him a habit in conduct; and in so far as habit in conduct is associated with a particular age, it is regarded as the unconscious instrument of the Time Spirit."

The system of ethical habit in a community is of a dominating character, for the decision and influence of the whole community is embodied in that social habit. Because such conduct is systematic and covers the whole of the field of society, the individual will is closely related by it to the will and spirit of the community. And out of this relation arises the power of adequately controlling the conduct of the individual. If this power fails or becomes weak the community degenerates and may fall to pieces. Different nations excel in their "Sittlichkeit" in different fashions. The spirit of the community and its ideals may vary greatly. There may be a low level of "Sittlichkeit"; and we have the spectacle of nations which have even degenerated in this

respect. It may possibly conflict with law and morality, as in the case of the duel. But when its level is high in a nation we admire the system, for we see it not only guiding a people and binding them together for national effort, but affording the most real freedom of thought and action for those who in daily life habitually act in harmony with the General Will.

Thus we have in the case of a community, be it the city or be it the state, an illustration of a sanction which is sufficient to compel observance of a rule without any question of the application of force. This kind of sanction may be of a highly compelling quality, and it often extends so far as to make the individual prefer the good of the community to his own. The development of many of our social institutions, of our hospitals, of our universities, and of other establishments of the kind, shows the extent to which it reaches and is powerful. But it has yet higher forms in which it approaches very nearly to the level of the obligation of conscience, although it is distinct from that form of obligation. I will try to make clear what I mean by illustrations. A man may be impelled to action of a high order by his sense of unity with the society to which he belongs, action of which, from the civic standpoint, all approve. What he does in such a case is natural to him, and is done without thought of reward or punishment; but it has reference to standards

of conduct set up by society and accepted just because society has set them up. There is a poem by the late Sir Alfred Lyall which exemplifies the high level that may be reached in such conduct. The poem is called *Theology in Extremis*, and it describes the feelings of an Englishman who had been taken prisoner by Mahometan rebels in the Indian Mutiny. He is face to face with a cruel death. They offer him his life if he will repeat something from the Koran. If he complies, no one is likely ever to hear of it, and he will be free to return to England and to the woman he loves. Moreover, and here is the real point, he is not a believer in Christianity, so that it is no question of denying his Saviour. What ought he to do? Deliverance is easy, and the relief and advantage would be unspeakably great. But he does not really hesitate, and every shadow of doubt disappears when he hears his fellow-prisoner, a half-caste, pattering eagerly the words demanded.

He himself has no hope of heaven and he loves life—

“ Yet for the honour of English race
May I not live or endure disgrace.
Ay, but the word if I could have said it,
I by no terrors of hell perplexed.
Hard to be silent and have no credit
From man in this world, or reward in the next;
None to bear witness and reckon the cost
Of the name that is saved by the life that is lost.

I must begone to the crowd untold
Of men by the cause which they served unknown,
Who moulder in myriad graves of old ;
Never a story and never a stone
Tells of the martyrs who die like me
Just for the pride of the old countree."

I will take another example, this time from the literature of ancient Greece.

In one of the shortest but not least impressive of his *Dialogues*, the "Crito," Plato tells us of the character of Socrates, not as a philosopher, but as a good citizen. He has been unjustly condemned by the Athenians as an enemy to the good of the state. Crito comes to him in prison to persuade him to escape. He urges on him many arguments, his duty to his children included. But Socrates refuses. He chooses to follow, not what anyone in the crowd might do, but the example which the ideal citizen should set. It would be a breach of his duty to fly from the judgment duly passed in the Athens to which he belongs, even though he thinks the decree should have been different. For it is the decree of the established justice of his City State. He will not "play truant." He hears the words, "Listen, Socrates, to us who have brought you up"; and in reply he refuses to go away, in these final sentences : "This is the voice which I seem to hear murmuring in my ears, like the sound of the flute in the ears of the mystic; that voice, I say, is murmuring in my ears, and prevents me

from hearing any other. And I know that anything more which you may say will be vain."

Why do men of this stamp act so, it may be when leading the battle line, it may be at critical moments of quite other kinds? It is, I think, because they are more than mere individuals. Individual they are, but completely real, even as individual, only in their relation to organic and social wholes in which they are members, such as the family, the city, the state. There is in every truly organised community a Common Will which is willed by those who compose that community, and who in so willing are more than isolated men and women. It is not, indeed, as unrelated atoms that they have lived. They have grown, from the receptive days of childhood up to maturity, in an atmosphere of example and general custom, and their lives have widened out from one little world to other and higher worlds, so that, through occupying successive stations in life, they more and more come to make their own the life of the social whole in which they move and have their being. They cannot mark off or define their own individualities without reference to the individualities of others. And so they unconsciously find themselves as in truth pulse-beats of the whole system, and themselves the whole system. It is real in them and they in it. They

are real only because they are social. The notion that the individual is the highest form of reality, and that the relationship of individuals is one of mere contract, the notion of Hobbes and of Bentham and of Austin, turns out to be quite inadequate. Even of an everyday contract, that of marriage, it has been well said that it is a contract to pass out of the sphere of contract, and that it is possible only because the contracting parties are already beyond and above that sphere. As a modern writer, F. H. Bradley of Oxford, to whose investigations in these regions we owe much, has finely said¹: "The moral organism is not a mere animal organism. In the latter the member is not aware of itself as such, while in the former it knows itself, and therefore knows the whole in itself. The narrow external function of the man is not the whole man. He has a life which we cannot see with our eyes, and there is no duty so mean that it is not the realisation of this, and knowable as such. What counts is not the visible outer work so much as the spirit in which it is done. The breadth of my life is not measured by the multitude of my pursuits, nor the space I take up amongst other men; but by the fulness of the whole life which I know as mine. It is true that less now depends on each of us as this or that man; it is not true that our individuality is

¹ *Ethical Studies*, p. 170.

therefore lessened, that therefore we have less in us."

There is, according to this view, a General Will with which the will of the good citizen is in accord. He feels that he would despise himself were his private will not in harmony with it. The notion of the reality of such a will is no new one. It is as old as the Greeks, for whom the moral order and the city state were closely related; and we find it in modern books in which we do not look for it. Jean Jacques Rousseau is probably best known to the world by the famous words in which he begins the first chapter of the *Social Contract*: "Man is born free, and everywhere he is in chains. Those who think themselves to be the masters of others cease not to be greater slaves than the people they govern." He goes on in the next paragraph to tell us that if he were only to consider force and the effects of it, he would say that if a nation was constrained to obey and did obey, it did well, but that whenever it could throw off its yoke and did throw it off, it acted better. His words, written in 1762, became a text for the pioneers of the French Revolution. But they would have done well to read further into the book. As Rousseau goes on we find a different conception. He passes from considering the fiction of a Social Contract to a discussion of the power over the individual of

the General Will, by virtue of which a people becomes a people. This General Will, the *Volonté Générale*, he distinguishes from the *Volonté de Tous*, which is a mere numerical sum of individual wills. These particular wills do not rise above themselves. The General Will, on the other hand, represents what is greater than the individual volition of those who compose the society of which it is the will. On occasions this higher will is more apparent than at other times. But it may, if there is social slackness, be difficult to distinguish from a mere aggregate of voices, from the will of a mob. What is interesting is that Rousseau, so often associated with doctrine of quite another kind, should finally recognise the bond of a General Will as what really holds the community together. For him, as for those who have had a yet clearer grasp of the principle, in willing the General Will we not only realise our true selves but we may rise above our ordinary habit of mind. We may reach heights which we could not reach, or which at all events most of us could not reach, in isolation. There are few observers who have not been impressed with the wonderful unity and concentration of purpose which an entire nation may display—above all, in a period of crisis. We see it in time of war, when a nation is fighting for its life or for a great cause. We have seen it in Japan, and we

have seen it still more recently even among the peoples of the Balkan Peninsula. We have marvelled at the illustrations with which history abounds of the General Will rising to heights of which but few of the individual citizens in whom it is embodied have ever before been conscious even in their dreams.

In his life of Themistocles Plutarch tells us how even in time of peace the leader of the Athenian people could fashion them into an undivided community and inspire them to rise above themselves. It was before the Persians had actually threatened to invade Attica that Themistocles foresaw what would come. Greece could not raise armies comparable in numbers to those of the Persian kings. But he told his people that the oracle had spoken thus : "When all things else are taken within the boundary of Cecrops and the covert of divine Cithaeron, Zeus grants to Athena that the wall of wood alone shall remain uncaptured, which shall help thee and thy children." The Athenian citizens were accustomed in each year to divide among themselves the revenue of their silver mines at Laurium. Themistocles had the daring, so Plutarch tells us, to come forward and boldly propose that the usual distribution should cease, and that they should let him spend the money for them in building a hundred ships. The citizens rose to his lead, the ships were built,

and with them the Greeks were able at a later date to win against Xerxes the great sea-fight at Salamis, and to defeat an invasion by the hosts of Persia which, had it succeeded, might have changed the course of modern as well as ancient history.

By such leadership it is that a common ideal can be made to penetrate the soul of a people, and to take complete possession of it. The ideal may be very high, or it may be of so ordinary a kind that we are not conscious of it without the effort of reflection. But when it is there it influences and guides daily conduct. Such idealism passes beyond the sphere of law, which provides only what is necessary for mutual protection and liberty of just action. It falls short, on the other hand, in quality of the dictates of what Kant called the Categorical Imperative that rules the private and individual conscience, but that alone, an Imperative which therefore gives insufficient guidance for ordinary and daily social life. Yet the ideal of which I speak is not the less binding; and it is recognised as so binding that the conduct of all good men conforms to it.

Thus we find within the single state the evidence of a sanction which is less than legal but more than merely moral, and which is sufficient, in the vast majority of the events of daily life, to secure observance of general standards of conduct

without any question of resort to force. If this is so within a nation, can it be so as between nations? This brings me at once to my third point. Can nations form a group or community among themselves within which a habit of looking to common ideals may grow up sufficiently strong to develop a General Will, and to make the binding power of these ideals a reliable sanction for their obligations to each other?

There is, I think, nothing in the real nature of nationality that precludes such a possibility. A famous student of history has bequeathed to us a definition of nationality which is worth attention: I refer to Ernest Renan, of whom George Meredith once said to me, while the great French critic was still living, that there was more in his head than in any other head in Europe. Renan tells us that "Man is enslaved neither by his race, nor by his language, nor by his religion, nor by the course of rivers, nor by the direction of mountain ranges. A great aggregation of men, sane of mind and warm of heart, creates a moral consciousness which is called a nation." Another acute critic of life, Matthew Arnold, citing one still greater than himself, draws what is in effect a deduction from the same proposition. "Let us," he says,¹ "conceive of the whole group of civilised nations

¹ *Preface to the Poems of Wordsworth.*

as being, for intellectual and spiritual purposes, one great confederation, bound to a joint action and working towards a common result; a confederation whose members have a due knowledge both of the past, out of which they all proceed, and of each other. This was the ideal of Goethe, and it is an ideal which will impose itself upon the thoughts of our modern societies more and more."

But while I admire the faith of Renan and Arnold and Goethe in what they all three believed to be the future of humanity, there is a long road yet to be travelled before what they hoped for can be fully accomplished. Grotius concludes his great book on War and Peace with a noble prayer: "May God write," he said, "these lessons—He Who alone can—on the hearts of all those who have the affairs of Christendom in their hands. And may He give to those persons a mind fitted to understand and to respect rights, human and divine, and lead them to recollect always that the ministration committed to them is no less than this, that they are the Governors of Man, a creature most dear to God."

The prayer of Grotius has not yet been fulfilled, nor do recent events point to the fulfilment as being near. The world is probably a long way off from the abolition of armaments and the peril of war. For habits of mind which

can be sufficiently strong with a single people can hardly be as strong between nations. There does not exist the same extent of common interest, of common purpose, and of common tradition. And yet the tendency, even as between nations that stand in no special relation to each other, to develop such a habit of mind is in our time becoming recognisable. There are signs that the best people in the best nations are ceasing to wish to live in a world of mere claims, and to proclaim on every occasion "Our country, right or wrong." There is growing up a disposition to believe that it is good, not only for all men but for all nations, to consider their neighbours' point of view as well as their own. There is apparent at least a tendency to seek for a higher standard of ideals in international relations. The barbarism which once looked to conquest and the waging of successful war as the main object of statesmanship, seems as though it were passing away. There have been established rules of International Law which already govern the conduct of war itself, and are generally observed as binding by all civilised people, with the result that the cruelties of war have been lessened. If practice falls short of theory, at least there is to-day little effective challenge of the broad principle that a nation has as regards its neighbours duties as well as rights. It is this spirit that may develop as time goes on

into a full international "Sittlichkeit." But such development is certainly still easier and more hopeful in the case of nations with some special relation, than it is within a mere aggregate of nations. At times a common interest among nations with special relations of the kind I am thinking of gives birth to a social habit of thought and action which in the end crystallises into a treaty, a treaty which in its turn stimulates the process that gave it birth. We see this in the case of Germany and Austria, and in that of France and Russia. Sometimes a friendly relationship grows up without crystallising into a general treaty. Such has been the case between my own country and France. We have no convention excepting one confined to the settlement of old controversies over specific subjects, a convention which has nothing to do with war. None the less, since in that convention there was embodied the testimony of willingness to give as well as to take, and to be mutually understanding and helpful, there has arisen between France and England a new kind of feeling which forms a real tie. It is still young, and it may stand still or diminish. But equally well it may advance and grow, and it is earnestly to be hoped that it will do so.

Recent events in Europe and the way in which the Great Powers have worked together to preserve the peace of Europe, as if forming

one community, point to the ethical possibilities of the group system as deserving of close study by both statesmen and students. The "Sittlichkeit" which can develop itself between the peoples of even a loosely connected group seems to promise a sanction for International Obligation which has not hitherto, so far as I know, attracted attention in connection with International Law. But if the group system deserves attention in the cases referred to, how much more does it call for attention in another and far more striking case!

In the year which is approaching, a century will have passed since the United States and the people of Canada and Great Britain terminated a great war by the Peace of Ghent. On both sides the combatants felt that war to be unnatural and one that should never have commenced. And now we have lived for nearly a hundred years, not only in peace, but also, I think, in process of coming to a deepening and yet more complete understanding of each other, and to the possession of common ends and ideals, ends and ideals which are natural to the Anglo-Saxon group, and to that group alone. It seems to me that within our community there is growing an ethical feeling which has something approaching to the binding quality of which I have been speaking. Men may violate the obligations which that feeling suggests, but by a

vast number of our respective citizens it would not be accounted decent to do so. For the nations in such a group as ours to violate these obligations would be as if respectable neighbours should fall to blows because of a difference of opinion. We may disagree on specific points and we probably shall, but the differences should be settled in the spirit and in the manner in which citizens usually settle their differences. The new attitude which is growing up has changed many things, and made much that once happened no longer likely to recur. I am concerned when I come across things that were written about America by British novelists only fifty years ago, and I doubt not that there are some things in the American literature of days gone past which many here would wish to have been without. But now that sort of writing is happily over, and we are realising more and more the significance of our joint tradition and of the common interests which are ours. It is a splendid example to the world that Canada and the United States should have nearly four thousand miles of frontier practically unfortified. As an ex-War Minister, who knows what a saving in unproductive expenditure this means, I fervently hope that it may never be otherwise.

But it is not merely in external results that the pursuit of a growing common ideal shows itself when such an ideal is really in men's

minds. It transforms the spirit in which we regard each other, and it gives us faith in each other—

“ Why, what but faith, do we abhor
And idolise each other for—
Faith in our evil or our good,
Which is or is not understood
Aright by those we love or those
We hate, thence called our friends or foes.”

I think that for the future of the relations between the United States on the one hand and Canada and Great Britain on the other, those who are assembled in this great meeting have their own special responsibility. We who are the lawyers of the New World and of the old mother country possess, as I have said to you, a tradition which is distinctive and peculiarly our own. We have been taught to look on our system of justice, not as something that waits to be embodied in abstract codes before it can be said to exist, but as what we ourselves are progressively and co-operatively evolving. And our power of influence is not confined to the securing of municipal justice. We play a large part in public affairs, and we influence our fellow-men in questions which go far beyond the province of the law, and which extend in the relations of society to that “Sittlichkeit” of which I have spoken. In this region we exert much control. If, then, there is to grow up

among the nations of our group, and between that group and the rest of civilisation, a yet further development of "Sittlichkeit," has not our profession special opportunities of influencing opinion, which are coupled with a deep responsibility? To me, when I look to the history of our calling in the three countries, it seems that the answer to this question requires no argument and admits of no controversy. It is our very habit of regarding the law and the wider rules of conduct which lie beyond the law as something to be moulded afresh as society develops, and to be moulded best if we co-operate steadily, that gives us an influence perhaps greater than is strictly ours, an influence which may in affairs of the state be potently exercised for good or for evil.

This, then, is why, as a lawyer speaking to lawyers, I have a strong sense of responsibility in being present here to-day, and why I believe that many of you share my feeling. A movement is in progress which we, by the character of our calling as judges and as advocates, have special opportunities to further. The sphere of our action has its limits, but at least it is given to us as a body to be the counsellors of our fellow-citizens in public and in private life alike. I have before my mind the words which I have already quoted of the present President of the United States, when he spoke of "lawyers

who can think in the terms of society itself." And I believe that if, in the language of yet another president, in the famous words of Lincoln, we as a body in our minds and hearts "highly resolve" to work for the general recognition by society of the binding character of international duties and rights as they arise within the Anglo-Saxon group, we shall not resolve in vain. A mere common desire may seem an intangible instrument, and yet, intangible as it is, it may be enough to form the beginning of what in the end will make the whole difference. Ideas have hands and feet, and the ideas of a congress such as this may affect public opinion deeply. It is easy to fail to realise how much an occasion like the assemblage in Montreal of the American Bar Association, on the eve of a great international centenary, can be made to mean, and it is easy to let such an occasion pass with a too timid modesty. Should we let it pass now, I think a real opportunity for doing good will just thereby have been missed by you and me. We need say nothing; we need pass no cut and dried resolution. It is the spirit and not the letter that is the one thing needful.

I do not apologise for having trespassed on the time and attention of this remarkable meeting for so long, or for urging what may seem to belong more to ethics than to law. We are bound to search after fresh principles if we

desire to find firm foundations for a progressive practical life. It is the absence of a clear conception of principle that occasions some at least of the obscurities and perplexities that beset us in the giving of counsel and in following it. On the other hand, it is futile to delay action until reflection has cleared up all our difficulties. If we would learn to swim, we must first enter the water. We must not refuse to begin our journey until the whole of the road we may have to travel lies mapped out before us. A great thinker declared that it is not Philosophy which first gives us the truth that lies to hand around us, and that mankind has not to wait for Philosophy in order to be conscious of this truth. Plain John Locke put the same thing in more homely words when he said that "God has not been so sparing to men to make them two-legged creatures, and left it to Aristotle to make them rational." Yet the reflective spirit does help, not by furnishing us with dogmas or final conclusions, or even with lines of action that are always definite, but by the insight which it gives, an insight that develops in us what Plato called the "synoptic mind," the mind that enables us to see things steadily as well as to see them whole.

And now I have expressed what I had in my mind. Your welcome to me has been indeed a generous one, and I shall carry the

memory of it back over the Atlantic. But the occasion has seemed to me significant of something beyond even its splendid hospitality. I have interpreted it, and I think not wrongly, as the symbol of a desire that extends beyond the limits of this assemblage. I mean the desire that we should steadily direct our thoughts to how we can draw into closest harmony the nations of a race in which all of us have a common pride. If that be now a far-spread inclination, then indeed may the people of three great countries say to Jerusalem, "Thou shalt be built," and to the Temple, "Thy foundation shall be laid."

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